

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RIGOBERTO ALVARADO-GUIZAR,

Defendant.

NO. CR-01-6013-EFS

**ORDER ON PETITION FOR WRIT OF
ERROR AUDITA QUERELA**

Before the Court, without oral argument, is federal inmate Rigoberto Alvarado-Guizar's Petition for Writ of Error Audita Querela Title 28 U.S.C. § 1651 (ECF No. [144](#)). This Court has denied Mr. Alvarado-Guizar's two previous 28 U.S.C. § 2255 habeas petitions (ECF Nos. [137](#) & [141](#)).

By his motion, which he styles as a "Petition for Writ of Error Audita Querela Title 28 U.S.C. § 1651," Mr. Alvarado-Guizar challenges his guilty-plea conviction and the 188-month sentence entered against him in 2002 for conspiracy to distribute, possession with intent to distribute, and aiding and abetting another in possessing with intent to distribute methamphetamine under 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A)(viii). Mr. Alvarado-Guizar contends that his sentence, while correct when rendered, is now unconstitutional in light of the Supreme Court's rulings in *Jones v. United States*, 526 U.S. 227 (1999); *Appendi*

1 v. *New Jersey*, 120 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 2531
2 (2004); and *United States v. Booker*, 543 U.S. 220 (2005).¹

3 A writ of *audita querela* is an ancient writ, long ago abolished in
4 federal civil proceedings, see Fed. R. Civ. P. 60(b) advisory committee
5 note, and has questionable relevance to criminal sentences. It only
6 potentially survives in the federal criminal context under the Supreme
7 Court's decision in *United States v. Morgan*, 346 U.S. 502 (1954), and the
8 All Writs Act, 28 U.S.C. § 1651, to fill the gaps in the current system
9 of post-conviction relief. *United States v. Valdez-Pacheco*, 237 F.3d
10 1077, 1079 (9th Cir. 2001).

11 Notwithstanding his characterization of his pleading, Mr. Alvarado-
12 Guizar's petition appears to be cognizable as one to vacate, set aside,
13 or correct sentence pursuant to 28 U.S.C. § 2255. See 28 U.S.C. § 2255
14 (allowing a federal prisoner to collaterally challenge a federal
15 conviction or sentence). In essence, he argues that invoking the
16 procedural barriers under § 2255(f) and (h) would raise serious
17 constitutional questions by denying him a judicial forum to raise his
18 claims. But a federal prisoner may not challenge a conviction or
19 sentence by way of a petition for writ of *audita querela* if that
20 challenge is cognizable under § 2255 - there is no "gap" in post-
21 conviction relief to fill. *Id.* Nor may he "circumvent valid
22 congressional limitations on collateral attacks by asserting that those
23 very limitations create a gap in the postconviction remedies that must

25 ¹ Mr. Alvarado-Guizar also cites to *United States v. Fanfan*, 543
26 U.S. 220 (2005), which was decided in conjunction with *Booker*.

1 be filled by common law writs." *Id.* at 1080 (finding writ of *audita*
2 *querela* unavailable because federal inmate's claims were cognizable in
3 a § 2255 motion); *see also United States v. Holt*, 417 F.3d 1172, 1175
4 (11th Cir. 2005) (holding "that a petition for writ of *audita querela* may
5 not be granted when relief is cognizable under § 2255" and denying the
6 petition as a successive § 2255 petition). Here, if the Court were to
7 allow Mr. Alvarado-Guizar to bring a petition for writ of *audita querela*,
8 it would allow him, as explained below, to circumvent the one-year
9 statute of limitations and the restriction against filing successive
10 petitions, making those requirements meaningless. Because his claims
11 would have been cognizable in an initial timely § 2255 motion to vacate
12 his conviction and sentence,² a writ of *audita querela* is not available
13 to him.

14 If this Court were to restyle Mr. Alvarado-Guizar's petition as one
15 pursuant to § 2255, it would be denied because Mr. Alvarado-Guizar has

16 ² Mr. Alvarado-Guizar cites to *United States v. Salgado*, 692 F.
17 Supp. 1265 (E.D. Wash. 1988), in which the court granted *audita querela*
18 relief. Not only is *Salgado* highly criticized, but it is also
19 distinguishable from this case: *Salgado* concerned not a challenge to a
20 prison sentence but rather the collateral (immigration) consequences of
21 an old conviction. The other case Mr. Alvarado-Guizar cites to, *United*
22 *States v. Holder*, 741 F. Supp. 27 (D.P.R. 1990), is similarly
23 distinguishable because it involved a challenge to an old conviction that
24 prevented the petitioner from obtaining permanent resident status in the
25 United States.
26

1 already filed two previous § 2255 motions. A second or successive
2 petition under § 2255 may not be filed unless the petitioner first
3 obtains an order authorizing this Court to consider the petition from the
4 United States Court of Appeals for the Ninth Circuit. 28 U.S.C. §§ 2255,
5 2244(b)(3)(A). In order to obtain such an order from the Ninth Circuit,
6 petitioner must show either:

- 7 (1) newly discovered evidence that, if proven and viewed in the
8 light of the evidence as a whole, would be sufficient to
9 establish by clear and convincing evidence that no reasonable
10 factfinder would have found the movant guilty of the offense;
11 or
12 (2) a new rule of constitutional law, made retroactive to cases
13 on collateral review by the Supreme Court, that was previously
14 unavailable.

15 28 U.S.C. § 2255(h)(2). A review of Mr. Alvarado-Guizar's motion reveals
16 that he has not met these requirements. He cites to no newly-discovered
17 evidence which would entitle him to post-conviction relief. And it is
18 well-settled that the Supreme Court's rulings in *Blakely* and *Booker* do
19 not apply retroactively to cases in which the conviction was final as of
20 the dates those cases were decided. See *United States v. Cruz*, 423 F.3d
21 1119, 1120-21 (9th Cir. 2005) (holding that *Booker* does not apply
22 retroactively to convictions that are final before *Booker*'s publication);
23 *Cook v. United States*, 386 F.3d 949, 905 (9th Cir. 2004) (denying
24 authorization to file successive § 2255 motion under *Blakely* for the same
25 reason). Indeed, this Court has already denied Mr. Alvarado-Guizar's
26 previous request to file a successive motion under subsection (2) on
those grounds. (ECF No. [137](#).) Mr. Alvarado-Guizar was sentenced on June
5, 2002, and the Judgment, was entered on June 6, 2002. (ECF Nos. 105
& 106). Mr. Alvarado-Guizar's conviction became final ten days after the

1 entry of the Judgment. Fed. R. App. P. 4(b)(1)(A)(i); see *United States*
2 *v. Schwartz*, 274 F.3d 1220, 1223 (9th Cir. 2001); 28 U.S.C. § 2244(d)(1).
3 Because Mr. Guizar's conviction became final on a date prior to the
4 Supreme Court's rulings *Blakely* (June 24, 2004) and *Booker* (January 12,
5 2005), these arguments fail.

6 But even assuming those cases involved a constitutional right
7 recognized by the Supreme Court made retroactively applicable to cases
8 on collateral review, Mr. Alvarado-Guizar's petition would not be timely.
9 Section 2255 specifies that in order to bring such a suit, the petitioner
10 must file suit within a year of:

- 11 (1) the date on which the judgment of conviction becomes final;
12 (2) the date on which the impediment to making a motion created
13 by governmental action in violation of the Constitution or laws
14 of the United States is removed, if the movant was prevented
15 from making a motion by such governmental action;
16 (3) the date on which the right asserted was initially
17 recognized by the Supreme Court, if that right has been newly
18 recognized by the Supreme Court and made retroactively
19 applicable to cases on collateral review; or
20 (4) the date on which the facts supporting the claim or claims
21 presented could have been discovered through the exercise of
22 due diligence.

23 *Id.* Subsection (1) is not applicable as nearly eight years have passed
24 between the date the judgment became final and the filing of this
25 petition on July 26, 2010. Subsection (3) is also not applicable
26 because, as set forth above, the cases to which Mr. Alvarado-Guizar cites
are not retroactively applied.

Apparently realizing that § 2255 post-conviction relief would be
unavailable to him, Mr. Alvarado-Guizar styled his petition as one for

1 writ of *audita querela*. The Court finds relief under either writ is
2 inappropriate.

3 For these reasons, **IT IS HEREBY ORDERED:**

4 1. Mr. Alvarado-Guizar's Petition for Writ of Error *Audita Querela*
5 Title 28 U.S.C. § 1651 (**ECF No. [144](#)**) is **DENIED**.

6 **IT IS SO ORDERED.** The District Court Executive is directed to enter
7 this Order and provide a copy to the Defendant:

8 Rigoberto Alvarado-Guizar (15430-085)
9 FCI Lompoc
3600 Guard Road
10 Lompoc, CA 93436

11 **DATED** this 16th day of November, 2010.

12
13 _____
S/ Edward F. Shea

14 EDWARD F. SHEA

15 United States District Judge

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